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CHARLES ELMORE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 3

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

RESPONDENTS' MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Respondents.

INDEX

	Page
Appendix A	3
Appendix B	4
Appendix C	5
Appendix D	7
Certificate of pendency of Appeal from Judgment	4
Certificate of pendency of appeal from Order	7
Federal Question not raised	2
Motion	1
No final judgment	1
Notice of Appeal from Judgment	3
Notice of Appeal from Order	5

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1931

No. 494

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

vs.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Respondents.

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Come now Vivian F. Baldwin and E. R. Baldwin, respondents in the above entitled cause, and respectfully move this Honorable Court to dismiss the petition of the American Surety Company of New York for a writ of certiorari to the Supreme Court of Idaho upon the following grounds:

I.

That the decision of the Supreme Court of Idaho reversing the order of the lower court vacating the judgment in favor of respondents herein, was not a final judgment or determination of the litigation by the Supreme Court of Idaho for the following reasons:

(a) That following the decision of the Supreme Court of Idaho, dated May 2, 1931, and the denial of the petition for re-hearing, the American Surety Company on the 13th day of July, 1931, filed its notice of appeal to the Supreme Court of Idaho from the judgment in question (Appendix A, p. 3), which appeal is now pending and undisposed of in the Supreme Court of the State of Idaho. (Appendix B, p. 4.)

(b) That following the decision of the Supreme Court of Idaho, dated May 2, 1931, and the denial of the petition for re-hearing on June 3, 1931, the American Surety Company filed a motion in the lower court to "correct said judgment **** and to vacate said judgment as corrected" which was denied by the trial court on July 13, 1931, and on the 15th day of July, 1931, the surety company filed notice of appeal to the Supreme Court of the State of Idaho from said order (Appendix C, p. 5), and which said appeal is now pending and undisposed of in the Supreme Court of the State of Idaho. (Appendix D, p. 7.)

II.

That no Federal question is involved or properly raised in this Honorable Court as is disclosed by the following portions of the record:

(a) The original motion of the surety company (R. 22-24) discloses that no Federal question or claim of denial of due process of law was raised in the trial court.

(b) The opinion of the Supreme Court of Idaho (R. 46-54) discloses that no Federal question was presented to the Supreme Court of Idaho.

(c) No attempt was made to raise any Federal question in any manner until after the decision of the Supreme Court of Idaho, May 2, 1931, when it was raised for the first time by petition for re-hearing. (R. 68.)

Respectfully submitted,

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Respondents.

I, JAMES F. AILSHIE, counsel for respondents in the above entitled cause, do solemnly swear that the facts recited in the foregoing motion to dismiss are true, to the best of my knowledge and belief. JAMES F. AILSHIE.

Subscribed and sworn to before me this 17th day of November, 1931. MILES F. EGBERS,

[SEAL] *Notary Public for Idaho.*

APPENDIX A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNY OF ADA

VIVIAN F. BALDWIN and E. R. BALDWIN, *Plaintiffs,*

vs.

ED. ANDERSON, *Defendant,*

and

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety, *Defendant.*

Filed July 13, 1931.
Stephen Utter, Clerk.
By B. Clyde Eagleson, Deputy

No. 11,860

NOTICE OF APPEAL

TO THE ABOVE NAMED PLAINTIFFS, VIVIAN F. BALDWIN AND E. R. BALDWIN, AND TO JAMES F. AILSHIE, JR., AND J. R. SMEAD, THEIR ATTORNEYS OF RECORD, AND TO ED. ANDERSON, DEFENDANT, AND TO H. B. WALKER, HIS ATTORNEY OF RECORD, AND TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain judgment for $22,357.21, filed and entered against the said defendant in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on June 23, 1930, and from the whole of said judgment against said defendant American Surety Company of New York.

Dated this 13th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company of New York.
Residence: Boise, Idaho.

Service of the above and foregoing Notice of Appeal is hereby admitted this 13th day of July, 1931, at 2:10 p. m.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

Service of the above and foregoing Notice of Appeal is hereby admitted this 13th day of July, 1931.

ED. ANDERSON,
Defendant.

STATE OF IDAHO, } ss.
COUNTY OF ADA }

I, STEPHEN UTTER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original Notice of Appeal filed in the above entitled action and remaining now on file in my office in Boise City, Ada County, Idaho.

GIVEN under my hand and the seal of said court at Boise City, Ada County, Idaho, this 12th day of November, 1931.

STEPHEN UTTER,
Clerk.
By OTTO F. PETERSON,
Deputy.

[SEAL]

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

VIVIAN F. BALDWIN and E. R. BALDWIN, *Respondents,*

vs.

ED. ANDERSON, *Defendant,* and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Appellant.*

No. 5783
CERTIFICATE

I, T. BAILEY LEE, Chief Justice of the Supreme Court of the State of Idaho, do hereby certify that the above entitled cause, being an appeal from the judgment entered June 23,

1930, in case No. 11860 in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, in which notice of appeal was filed July 13, 1931, is now pending and undisposed of in the Supreme Court of the State of Idaho.

November 12, 1931. T. BAILEY LEE,
Chief Justice.

Attest:
CLAY KOELSCH, *Clerk.* [SEAL]

APPENDIX C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

VIVIAN F. BALDWIN and E. R. BALDWIN, *Plaintiffs,*

vs.

ED. ANDERSON, *Defendant,*

and

AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, Surety, *Defendant.*

Filed July 15, 1931.
Stephen Utter, Clerk.
By B. Clyde Eagleson, Deputy

No. 11,860

NOTICE OF APPEAL

TO THE ABOVE NAMED PLAINTIFFS, VIVIAN F. BALDWIN AND E. R. BALDWIN, AND TO JAMES F. AILSHIE, JR., AND J. R. SMEAD, THEIR ATTORNEYS OF RECORD, AND TO ED. ANDERSON, DEFENDANT, AND TO H. B. WALKER, HIS ATTORNEY OF RECORD, AND TO THE CLERK OF THE ABOVE ENTITLED COURT:

YOU and each of you will please take notice that American Surety Company of New York, a corporation, surety, one of the above named defendants, hereby appeals to the Supreme Court of the State of Idaho from that certain order of the above entitled Court made and entered on the 13th day of July, 1931, denying and overruling the motion of said defendant American Surety Company of New York to correct said

judgment to make it speak the truth in certain particulars and to vacate said judgment as corrected and from the whole of said order.

Dated this 14th day of July, 1931.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for Defendant American Surety Company of New York.
Residence: Boise, Idaho.

Service of the above and foregoing Notice of Appeal is hereby admitted this 14th day of July, 1931.

JAMES F. AILSHIE, JR.
J. R. SMEAD,
Attorneys for Plaintiffs.

Service of the foregoing Notice of Appeal is hereby admitted this 14th day of July, 1931.

ED. ANDERSON,
Defendant.

STATE OF IDAHO, } ss.
COUNTY OF ADA }

I, STEPHEN UTTER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the foregoing is a true and correct copy of the original Notice of Appeal filed in the above entitled action and remaining now on file in my office in Boise City, Ada County, Idaho.

GIVEN under my hand and the seal of said court at Boise City, Ada County, Idaho, this 12th day of November, 1931.

STEPHEN UTTER,
Clerk.
By OTTO F. PETERSON,
Deputy.

[SEAL]

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF IDAHO

VIVIAN F. BALDWIN and E. R. BALDWIN, *Respondents,*

vs.

E D. A N D E R S O N, *Defendant,* and AMERICAN SURETY COMPANY OF NEW YORK, a Corporation, *Appellant.*

No. 5783
CERTIFICATE

I, T. BAILEY LEE, Chief Justice of the Supreme Court of the State of Idaho, do hereby certify that the above entitled cause, being an appeal from that certain order of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Ada, in case No. 11860, made and entered on the 13th day of July, 1931, denying and overruling the motion of defendant American Surety Company of New York to amend and correct the judgment of June 23, 1930, and to vacate said judgment as corrected and from the whole of said order, in which notice of appeal was filed July 15, 1931, is now pending and undisposed of in the Supreme Court of the State of Idaho.

November 12, 1931.

T. BAILEY LEE,
Chief Justice.

Attest:

CLAY KOELSCH, *Clerk.* [SEAL]

FILE COPY

NOV 30 1931

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 3

AMERICAN SURETY COMPANY OF NEW YORK,
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BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Respondents.

SUBJECT INDEX

Page

Statement of Facts 1

Argument—

Motion to vacate judgment still pending 3

Appeal from judgment also pending 3

Judgment not yet final 4

Appendix 6

TABLE OF CASES CITED

Andrews v. Virginian Ry. Co., 248 U. S. 272 5

Bostwick v. Brinkerhoff, 106 U. S. 3 4

Bruce, Adm., et al, v. Tobin, 245 U. S. 18 4

Chicago & N. W. Ry. v. Durham, 265 U. S. 580 4

STATUTES CITED

Idaho Compiled Statutes, Sec. 7152 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 494

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Respondents.

BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

The motion to dismiss petition for certiorari herein presents one point only. It has seemed necessary to present this point by motion, because it depends on facts which must be shown extraneous to the record filed herein by the petitioner. We have shown these facts by the Appendices annexed to the motion.

The petition, at *page* 3 thereof, makes it appear that the judgment of the State Supreme Court herein is final because no appeal was taken therefrom; and further states, in a footnote, that no appeal was possible because of lapse of time.

After judgment was entered in the lower state court against the American Surety Company, petitioner herein (R. 18-20), the surety company, by motion in the lower court (R. 22-24) procured the lower court's order purporting to vacate said judgment as void. (R. 32-33.) Respondents (judgment creditors in state court) appealed from that order

(R. 35-36) and thereafter the State Supreme Court reversed the lower court, holding that the judgment was not void. The opinion of the State Supreme Court appears in the record in full. (R. 46-55.) Attention is called to the fact that this appeal involved nothing but the lower court's order of vacation, and that the State Supreme Court expressly pointed out that the judgment against the petitioner could not be reviewed for error on that appeal. (R. 50, f. 149; 54, f. 161.)

Since that time the surety company has made two further attacks on the judgment against it, and both proceedings are pending in the Supreme Court of Idaho. It first filed a motion in the lower court to amend the judgment, and after amending, vacate it; and from the lower court's denial of such motion, it appealed. That appeal is still pending in the Supreme court.

See: Motion to Dismiss Petition, Appendix C and Appendix D, pp. 5-7 of Motion.

Petitioner has also appealed direct from the judgment to the Idaho Supreme Court, which appeal is also pending.

Motion to Dismiss, Appendix A and Appendix B, pp. 3-5.

Therefore, when the petition for certiorari was filed in this court, there was pending in the Supreme Court of Idaho petitioner's appeal from the judgment here complained of, and its motion to amend and vacate said judgment was also pending in that court on a second appeal; and both proceedings are still pending.

ARGUMENT AND AUTHORITIES

Obviously, if the Supreme Court of Idaho shall uphold this petitioner's motion to amend and *vacate* the judgment against it, that action will put an end to this litigation. Therefore, we think it sufficiently appears that the judgment in the state court is not yet final.

Further, if the State Supreme Court shall entertain petitioner's appeal from such judgment, it will thereupon review that judgment for error. If found erroneous, it will be reversed. This further possibility, we submit, amply demonstrates that the judgment in state court is not yet final.

Pending Motion to Vacate Judgment

That the lower court's order denying petitioner's motion to amend and vacate the judgment is properly appealable to the State Supreme Court cannot be doubted. Any special order made after rendition of judgment in the lower court is appealable under the statutes of Idaho.

Idaho Comp. Stat., Sec. 7152, subd. 2, *Appendix.*

We call attention to the fact that the petitioner had sixty days for such appeal, as shown by *Section* 7152, *supra;* and the showing appended to our motion to dismiss herein demonstrates that such appeal was taken within that period, to-wit, that the order denying the motion was made on July 13, 1931, and the appeal from that order was taken on the next day, July 14th.

See: Motion, Appendix C and Appendix D, pp. 5-7.

Appeal from Judgment Also Pending

As to the appeal from the judgment, it is true that it was not taken within ninety days next following the date of judgment.

Idaho Comp. Stat., Sec. 7152, Subd. 1, p. 6, *post.*

However, it is still a fact that this petitioner *has* appealed from the judgment and its appeal is still pending. It seems highly probable that its theory underlying such appeal is as follows: The judgment here complained of was entered on June 23, 1930. (R. 20, f. 60.) The lower court's order declaring that judgment void was entered on August 12, 1930, that being the *fiftieth* day from the date of judgment. (R. 32, f. 94.) Since that order purported to set the judgment aside, it can be contended that thereafter the judgment was not appealable until the final decision of the Supreme Court which reversed that order. In other words, that the order in the lower court vacating the judgment tolled the statute allowing ninety days after judgment for appeal (*Sec.* 7152, *supra*), and that there remained, therefore, an unexpired period of *forty* days which did not run until the final judgment of the Supreme Court reversing the lower court's order of vacation. Such reversal became final when the petition

for re-hearing in that proceeding was denied in the Supreme Court on June 3, 1931. (R. 117.)

If the Idaho Supreme Court shall uphold this theory, then this petitioner had a period of forty days next following June 3, 1931, in which to appeal from the judgment. It did appeal on the fortieth day, July 13, 1931.

See: Motion to Dismiss, Appendix A, page 3.

Finally, whatever petitioner's theory may be, the Supreme Court of Idaho is fully empowered to entertain the pending appeal and review the judgment for error, if it shall so construe the law of Idaho. It is wholly a matter to be decided under the Idaho statutes, it involves no Federal question, and the decision of the Idaho Supreme Court on the point will be conclusive.

The Judgment Is Not Yet Final

It follows that the judgment of the state courts here complained of is not yet a final judgment. Such being the case, we think this court, by a long and unbroken line of decisions, has held that the petition for certiorari herein should be denied.

Bruce, Administrator, et al. v. Tobin, 245 U. S. 18;
Chicago & N. W. Ry. v. Durham, 265 U. S. 580.

In *Bostwick v. Brinkerhoff,* 106 *U. S.* 3, this court said:

> "the rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance here the court below would have nothing to do but execute the judgment or the decree it had already rendered."

With particular reference to petitioner's pending appeal from the judgment, as distinguished from its other appeal in the matter of its motion to amend and vacate the judgment, even if it be assumed that it is doubtful whether or not the Idaho Supreme Court will hear such appeal, it still remains a fact that it is amply empowered to do so if it sees fit. In such a situation, the further language of this court, in

Andrews v. Virginian Ry. Co., 248 *U. S.* 272, 275, is particularly pertinent:

> "It is true that, under the law of Virginia, in a case like this the power of the court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; *but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final* at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. That this is true would seem to be demonstrated by considering that if it were not so, a judgment of a state court, susceptible of being reviewed by this court, would, notwithstanding that duty, be open at the same time to the power of a state court to review and reverse, thus, in substance, depriving each court of its power, and begetting the possibility of conflict and confusion." (Italics ours.)

CONCLUSION

We submit that either of the proceedings now pending in the Supreme Court of Idaho is sufficient to require the denial of this petition. In the one, the State Supreme Court may amend the judgment and vacate it. Such is the express tenor of the proceeding. In the other, the Supreme Court may review the judgment for error, and so doing, if it finds the judgment erroneous, will undoubtedly reverse it.

In any event, the judgment is not at present final, and the petition for certiorari should be denied.

Respectfully submitted,

JAMES F. AILSHIE,
JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Counsel for Respondents.